UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLANTIC CITY ELECTRIC COMPANY, **Employer,** **and** **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 210,** **Petitioner.**	**Case No. 04-RC-221319**

[PROPOSED] MEMORANDUM RESPONDING TO PETITIONER'S OPPOSITION TO ATLANTIC CITY ELECTRIC COMPANY'S REQUEST FOR REVIEW OF THE ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

In its July 23, 2018 Request for Review, Atlantic City Electric Company ("ACE" or the "Company") established that the Acting Regional Director's June 15, 2018 Decision and Direction of Election (the "Decision") ignored dispositive record evidence and misapplied National Labor Relations Board ("Board" or "NLRB") precedent when evaluating the supervisory status of the system operators and senior system operators ("System Operators") involved in this case.[1] In response, the International Brotherhood of Electrical Workers Local 210 (the "Union" or "Local 210") argues that the Company waived its right to seek review of that Decision. As demonstrated below, the Union's waiver argument is clearly erroneous because it (1) is contradicted by the terms of the parties' stipulation, which explicitly disclaimed any such waiver, (2) is in direct contravention of the Board's Rules and Regulations, and (3) requires an inefficient and wasteful approach to Board proceedings and resources.

[1] The Company also established a number of other grounds supporting its Request for Review, as further detailed in its July 23, 2018 submission. Although ACE reiterates those arguments by reference, the Company does not seek to revisit those issues in this response. Instead, this response focuses solely on the Union's waiver-by-stipulation procedural argument.

I. BACKGROUND

As detailed more fully in the Company's July 23, 2018 Request for Review, the petitioned-for unit involves a group of 18 System Operators who work in ACE's control room. The Company sought review, among other reasons, because the Regional Director ignored dispositive record evidence that the System Operators have the authority to assign and responsibly direct employees and exercise independent judgment in doing so, establishing their supervisory status under Section 2(11) of the National Labor Relations Act ("Act" or "NLRA") 29 U.S.C. § 152(11).

As detailed more fully in the Company's Request for Review, the Union filed a representation petition on February 14, 2017 in Case No. 04-RC-193066. The Board conducted a one-day hearing on February 28, 2017, during which the Company and the Union presented evidence on whether the System Operators are supervisors within the meaning of Section 2(11) of the Act. The Regional Director issued a Decision and Direction of Election on March 17, 2017, concluding that the System Operators were not supervisors. On March 27, 2017, the NLRB conducted an election in which the System Operators voted against representation by the Union.

On June 1, 2018, the Union filed another petition involving the same System Operators in Case No. 04-RC-221319. Rather than hold another hearing to create a factual record regarding supervisor status that would include the same testimony and exhibits entered in the prior case, the parties stipulated to the record from the 2017 hearing (the "Stipulation"). On June 15, 2018, the Acting Regional Director issued a Decision and Direction of Election adopting the Regional Director's 2017 decision. On June 25, 2018, the Region conducted an election in which the System Operators voted in favor of joining the existing unit represented by the Union.

The Company appropriately exercised its right to request Board review of the Acting Regional Director's legal conclusion that the System Operators are statutory employees. The Union argues that, by entering into the "Stipulation of Facts," the Company "knowingly waived its opportunity to argue . . . that the Region had departed from existing Board precedent or that compelling circumstances exist for the Region to depart from existing precedent." (Union's Opposition, at 3). The Union flatly mischaracterizes the parties' Stipulation as "stipulating to the prior matter's facts *and findings*" (*id.*, emphasis added), and the Union argues that "[t]he Employer cannot now be heard to complain about the Region's factual findings when it willingly waived an opportunity to provide additional facts to bolster its position." (*Id.*).

II. ARGUMENT

The Union's waiver claim is specious. As discussed further below, the Board should reject the Union's waiver argument for at least three reasons. First, the Union's argument is contradicted by the clear terms of the parties' Stipulation, which expressly acknowledges and preserves the parties' right to request review. Second, the Union's argument that the Company should have sought review of the Regional Director's 2017 decision after the employees voted against union representation is contrary to the Board's Rules and Regulations. Third, the Union's argument, if accepted, would create incentives for inefficient and wasteful use of the Board's procedures and resources.

A. The Union's Waiver Argument Is Contradicted by the Parties' Stipulation.

The Union's waiver argument should be rejected because it is plainly contradicted by the terms of the parties' Stipulation, which states in no uncertain terms:

> 1. The Parties stipulate that **neither Party has waived its right to request review by the National Labor Relations Board** in Washington, D.C. of the Decision issued by the Regional Director in this matter, Case No. 04-RC-221319.

> 2. The Parties agree that this Joint Stipulation of Facts, the transcript and exhibits in Case 04-RC-193066, and the stipulated exhibits attached to this document, shall constitute the entire record in this matter.

Stipulation, at 3 (emphasis added).

The stipulation therefore reflects an agreement to treat the testimony and exhibits from Case No. 04-RC-193066 as the record in this case, but it nowhere suggests that the Company agreed with the Regional Director's decision in 2017. Far from it, the Stipulation contemplated that the Regional Director would issue a new decision in this case, based on the record in the 2017 case, and the parties expressly reserved their right to seek review of that decision. Accordingly, the Board should reject the Union's waiver argument based on the plain language of the Stipulation.

B. The Union's Waiver Argument Contravenes the Board's Own Rules and Regulations.

The Union further suggests the Company waived its right to Review because it "never appealed or requested a review by the Board" of the Regional Director's decision in 2017. (Opposition, at 2). In other words, the Union suggests that—although the System Operators voted against union representation in 2017—the Company should have nonetheless sought review of the Regional Director's Decision and Direction of Election in the 2017 case. This argument is contrary to the Board's own Rules and Regulations. In explaining its revised representation case procedures on December 15, 2014, the Board clearly stated that there is no need to request review of a Regional Director's decision when that decision is mooted by the results of the election:

> The first notable change is that the due date for filing requests is relaxed. The Board's current practice of requiring parties to seek such review of directions of election before the election—or be deemed to have waived their right to take issue with the decision and direction of election—not only encourages unnecessary litigation, but actually requires parties to conduct unnecessary litigation. Thus, in

> the Board's experience, many pre-election disputes are either **rendered moot by the election results** or can be resolved by the parties after the election and without litigation once the strategic considerations related to the impending elections are removed from consideration. For example, if the regional director rejects an employer's contention that a petitioned-for unit is inappropriate and directs an election in the unit sought by the union, rather than in the alternative unit proposed by the employer, the Board's current rules require the employer to request review of that decision prior to the election or be precluded from contesting the unit determination at any time thereafter. **But if the union ends up losing an election, even though it was conducted in the union's desired unit, the employer's disagreement with the regional director's resolution becomes moot (because the employer will not have to deal with the union at all), eliminating the need for litigation of the issues at any time.** The current rules thus impose unnecessary costs on the parties by requiring them to file pre-election requests for review in order to preserve issues.
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> Accordingly, the Board has decided to amend the current pre-election request . . . . Under the amendments, a party can choose to file a request for review of the regional director's decision to direct an election before the election or can choose to wait to file the request for review until after the election. **We conclude that this amendment, which relieves parties of the burden of requesting pre-election review in order to preserve issues that may be mooted by the election results, will further the goal of reducing unnecessary litigation because, in our view, rational parties ordinarily will wait to file their requests for review until after the election, to see whether the election results have mooted the basis for such an appeal**. The amendment should also reduce the burdens on the other parties to the case and the government, by avoiding the need for the other parties to file responsive briefs and for the Board to rule on issues which could well be rendered moot by the election results.

79 Fed. Reg. 74308, at 74408 (Dec. 15, 2015) (emphasis added and footnotes omitted). *See also* NLRB Representation Case-Procedures Fact Sheet, *available at* https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-representation-case-procedures-fact-sheet (noting that parties may seek review of all regional representation-case rulings "if the election results have not made those rulings moot").

This case falls squarely within the meaning and purpose of these rules. The Regional Director's original decision was mooted by the election results in 2017. There was no reason for the Company to request review of the Regional Director's original decision because the Union lost the election in 2017. That is exactly the reason why the Board eliminated the requirement

for a party to seek a pre-election request for review. The Union's waiver argument is therefore clearly contrary to the Board's own rules and regulations.

C. The Union's Waiver Argument Would Result in Unnecessary Litigation and a Waste of Resources.

The Union contends the Company should have insisted on a hearing to present evidence on the issue of supervisory status all over again, rather than entering into a Stipulation that incorporated the record from the 2017 case. (Opposition, at 3). Not only is this argument contrary to the Board's Rules and Regulations, it would result in a waste of the Board's and the parties' resources. It would encourage parties to seek Board review when a Regional Director's decision has been mooted by the results of the election, and it would discourage the parties from stipulating to evidence that was submitted in a prior proceeding. The Board should reject such an approach, which would require needless and duplicative litigation, waste the parties' and the Board's resources, and delay elections—all of which is contrary to the purpose of the Board's Rules and Regulations.

III. CONCLUSION

For the foregoing reasons, the Board should reject the Union's waiver argument and grant the Company's Request for Review.

Respectfully submitted,

/s/ Jonathan C. Fritts

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